

# THE DYNAMIC DEVELOPMENT ON INDONESIA'S ATTITUDE TOWARD INTERNATIONAL LAW

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## **Abstract**

*The paper discusses the relation between international law and domestic law in the context of Indonesia. The paper examines Indonesia's viewpoints on international law by analysing the various stages in Indonesia's history from its independence through the present times. The attitude of Indonesia toward international law since its independence as a sovereign state has been changing progressively, from hostility to friendly. Indonesia, therefore, should shape its domestic legal system in such manner where international law acquires a proper legal status under it. It appears that the Indonesian legal system is not yet being developed into such direction.*

**Keywords:** *International law, domestic law, domestic legal status*

## **I. INTRODUCTION**

Being a part of the international community of states, Indonesia is bound by international law. As a member of G-20 the country is now an active sovereign state playing its role in global relations and its behaviours are governed by this law. At the regional level, Indonesia is entering into unprecedented international relations whereby its domestic legal system becomes integrated into ASEAN process that comes with the objective of establishing an ASEAN Community, a matter of which is undoubtedly the concern of international community. These current developments suffice for many to inquire the legal status of this body of law in Indonesia.

The relation between international law and municipal law is a subject with which many generations of lawyers have wrestled, are wrestling and will continue to wrestle.<sup>1</sup> Much has been written about the

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<sup>1</sup> Lambertus Erades, 'International Law and the Netherlands Legal Order', in H.F. van Panhuys (ed.), *International Law in the Netherlands*, vol. III (1980), 376.

relationship between international law and domestic law,<sup>2</sup> including the controversial debate over the theories of monism versus dualism as well as adoption versus transformation. A number of studies have explained the interface between treaties and their domestic implementation in many legal systems. Most of these studies, however, refer to developed countries,<sup>3</sup> and are confined only to a particular jurisdiction.<sup>4</sup> Little is known about how international obligations have been applied within the legal systems of newly independent states, post World War II, and how they work. Take Indonesia<sup>5</sup> for example, which is detached from the legal traditional approaches of its former colonial states.

Former colonies that inherited the established system of their former colonial states perhaps faced no difficulty in dealing with the relationship between international law and domestic law because the colonial legal system commonly addressed this issue. Most former colonies tend to apply the traditional approaches adopted by the metropolitan colonial powers.<sup>6</sup> Former British colonies tend to adopt the principles of the common law system, which to some extent provided the basis for the relationship between international law and domestic law. But for former colonies like Indonesia, the question of the status of treaties under domestic law is commonly undetermined.<sup>7</sup>

<sup>2</sup> The terms 'municipal law', 'national law', 'domestic law' and 'internal law' can be used interchangeably in this article in contrast with international law.

<sup>3</sup> For a thorough analysis of the status of treaties in a number of European legal systems and the United States of America, see Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (1987).

<sup>4</sup> Andrea Bianchi, 'International Law and US Courts: the Myth of Lohengrin Revisited', 15 *EJIL* (2004) 4, 751.. Contrary to the experiences of the Western countries, Ko argued that most Asian countries have hardly discussed this question, see Swan Sik Ko, 'International Law in Municipal Legal Orders of Asian States: Virgin Land', in Ronald St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994), 740.

<sup>5</sup> Comparative studies with reference to some developing countries' legal systems on treaty-making processes and the domestic status of treaties can be found in Duncan B. Hollis, Merritt R. Blakeslee and L. Benyamin Ederington (eds.), *National Treaty Law and Practice* (2005); David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement, A Comparative Study* (2009); Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011).

<sup>6</sup> Tiyanjana Maluwa, 'The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey', 23 *SAYIL* (1998), 48.

<sup>7</sup> Former British colonies in the developing world like in South Asia (India, Paki-

Indonesia is an independent state that gained its independence through means of a painful liberation war. As a consequence, Indonesia was not eager to adopt the colonial legal system. It went on to construct its own legal architecture.<sup>8</sup> Historically, Indonesia perceived international law as that which is associated with the established legal order that favours the colonial powers. International law was therefore considered unfriendly towards Indonesia, and a foreign element to the newly-founded Indonesian legal framework.

How this legal framework responds to international law and reflects international treaty obligations in its domestic law – particularly at a time when it considered international law unfriendly and alien to it – is an interesting academic subject. Until recently, scholars have not addressed this question in the academic sense and little has been written about this issue.<sup>9</sup>

Problems that arose in the relationship between treaties and Indonesian domestic law are peculiar and crucially important. Its historical background might be of relevance in examining Indonesia's view then of the domestic status of international law. Indonesia won its independence in an era of colonialism, which at the time was mainly associated with the Western world. That part of the world was perceived to be the drafters of 'international law'. Ko Swan Sik<sup>10</sup> argued that the question of giving legal effect to international law in the municipal sphere is connected with the historical experiences of those countries on the international level, in light of their non-Western origins and their political and legal cultures.

The attitude of the founding fathers of Indonesia as well as public perception towards international law, especially treaties, was influenced

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stan, Bangladesh, etc.) and Southeast Asia (Malaysia, Singapore, Brunei Darussalam) would inevitably apply the same principles of the British common law system on the status of treaties. However, Shaw suggested that while this would be the case in common law states, the civil law states manifest certain differences, see Malcolm N. Shaw, *International Law* (1997), 123.

<sup>8</sup> Swan Sik Ko categorizes these newly independent states as virgin land, see Ko (note 4), 737-752.

<sup>9</sup> The only available English source describing the Indonesian law of treaty so far is found in Swan Sik Ko, *The Indonesian Law and Treaties 1945-1990* (1993).

<sup>10</sup> Sik Ko (note 4), 738.

by the sentiment of nationalism, a culture of resistance or indifference to so-called 'colonial' international law. Indonesia separated from its colonial powers in a revolutionary manner and showed resistance to inheriting the Dutch legal tradition with regard to international law.<sup>11</sup> Indonesia is a newly born state that built its own legal framework on international law with its own paradigm. Although it absorbed part of the civil law traditional approaches of the Netherlands, Indonesia was determined to have its own legal system. It framed its Constitution in 1945 following independence and bring about a mixed of legal traditions: civil law, Islamic law and adat/ traditional law.

From its inception as a sovereign state until 1949, Indonesia fought to acquire recognition from its former colonial power. Since then, Indonesia experienced three consecutive regimes of government. The first regime was the so-called 'Old Order',<sup>12</sup> primarily characterized by the political system referred to as 'Guided Democracy', led by influential nationalist President Soekarno. In the beginning, Soekarno subscribed to this system but then moved on towards authoritarianism. The economic collapse in the 1960s was accompanied by the overthrow of his regime, and gave way to the 'New Order', led by the strongman President Soeharto. The New Order administration was characterized by a powerfully-centralized and military-dominated government under which democracy was not properly applicable. The economic collapse in 1998 pushed the regime to its impending end, and widespread protests ushered in the Reform Era, which in subsequent years saw Indonesian leaders bringing about democratic reforms in the bureaucratic, economic and political sectors.

During the course of the authoritarian regimes – the first and the second - debate over the relationship between international law and the newly-formed Indonesian legal system was not properly developed. The issue was not controversial and gave no impetus for the public to seek answers on the status of international law when viewed through

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<sup>11</sup> During the colonial period, Indonesia as such had no legal regime governing treaties since it was a part of the Netherlands and had no sovereign status. Following its independence, Indonesia inherited most of the Dutch legal system (civil law and criminal law), except constitutional law.

<sup>12</sup> The term 'Old Order' (1945-1966) was used and introduced by the 'New Order' regime (1966-1999).

domestic laws. In the Reform era (1999 – to present), the question of the status of treaties under domestic law came to the fore when Indonesia encountered internal and external pressures. Internal pressure came about as a result of a democratic system set in place and the legal standards that are commonly featured in democratic modern states, i.e. rule of law, parliamentary participation, separation of powers and legal certainty shall apply. The democratic legal standard requires for a clarified status of treaties under domestic law. External pressure was generated by globalization, which blurs the lines between international and domestic spheres. There are currently many international treaties that are of an intrusive nature from the perspective of state sovereignty, touching upon the typical domain of domestic law. These include treaties on environment, human rights and trade. Such conditions provided the push Indonesian scholars needed to search for answers on the status of international treaties under domestic law.

## **II. INDONESIAN VIEWPOINTS ON INTERNATIONAL LAW THROUGH THE YEARS**

### **A. HOSTILE ATTITUDE FOLLOWING INDEPENDENCE (1945-1966)**

Indonesia was to some extent aligned with the attitude of the other new Asian states in the earliest period after World War II towards established rules of international law i.e. being selective by which they would choose international law as whatever they thought to be useful to and compatible with their own views, but rejected the remainder as not or no longer be applicable.<sup>13</sup> The attitude of Indonesia towards international law is closely related to its historical experiences.. Indonesia gained independence through a very bitter liberation war against colonialism during a time when international law might be seen as favourable to the colonial powers and disadvantageous to the independence of colonies (separatism).<sup>14</sup> The founding fathers were preoccupied with

<sup>13</sup> James Leslie Brierly, *The Law of Nations* (1963), 43-44; J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961), 221.

<sup>14</sup> Indonesia's independence took place before the emerging of the rules of self-determination which was developed by the UN Universal Declaration of Human Rights of 1948 and Declaration of Granting Independence to Colonial People and Countries, 1960. Following the decolonization process after World War II, the view of developing countries towards international law became a classical topic in international law

anti-colonial sentiments and associated colonialism with the Western world and considered the latter had drafted out international law. Indonesia perceived international law as the law that justified subjugation of the people of Asia and Africa and buttressed colonialism.<sup>15</sup> Meanwhile, the unilateral proclamation of independence was seen by most European states and by the United States as an act that was in flagrant violation of international law.<sup>16</sup>

The war to survive Indonesia's independence resulted in the establishment of the Netherlands-Indonesia Union in 1949. From that point, Indonesia took a friendlier approach to international law. This Union was short-lived as it lasted until 1950. Indonesia unilaterally terminated the Dutch-Indonesian Round Table Agreement of 1949, which created further tensions between Indonesia and Netherlands, with the latter accusing the former of violating international law. From then on, relations between Indonesia and its former colonial powers became deteriorated. Nationalistic, anti-Western sentiments re-emerged.

The political outlook of the Indonesian elite was increasingly marked by anti economic and social liberalism. The spirit of the revolution got them to apply methods which they had used during the liberation war against the Dutch i.e. mass movements and anti-Western slogans.<sup>17</sup> The general political atmosphere had significantly affected the attitude towards international law.

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standard textbooks, see Shaw (note 7), 36-39; Michael Akehurst, *Modern Introduction to International Law* (1977), 29; Antonio Cassese, *International Law* (2005), 115-123. Some scholars advance discussion under the topic "Third World Approaches to International Law", see B.S. Chimni, 'Third World Approaches to International Law: Manifesto', 8 *International Community Law Review* (2006), 3-27; David P. Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law', 2 *Chinese JIL* (2003) 29, 1-46; Antony Anghe and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese JIL* (2003) 1, 77-103.

<sup>15</sup> The perception towards international law as a buttress of colonialism was shared by most Asians in the 20<sup>th</sup> century, see Muthucumaraswamy Sornarajah, 'Asian Perspective to International Law in the Age of Globalization', 5 *Sing. J. Int'l & Comp. L.* (2001) 2, 284-313.

<sup>16</sup> Sunaryati Hartono, 'The Interaction between National Law and International Law in Indonesia', in Paul Waart, Paul Peters and Erik Denters (eds.), *International Law and Development* (1988), 35.

<sup>17</sup> B.H. Vlekke, *Indonesia in 1956* (1957), 9.

The series of legal measures taken by Indonesia in regard to dealing with international law had been peculiar. In 1957, resentment against Indonesia at the United Nations was growing. The latter could not adhere to Indonesia's needs in regard to the dispute it had with the Netherlands over the status of the remaining colonial territory, West Irian. Indonesia's discontent over the matter led to the nationalization of all Dutch enterprises in Indonesia through the issuance of the Government Regulation No. 23 of 1958 concerning The Take-over of All Netherlands Enterprises into the control of the Indonesian government. This was further strengthened through Law No. 86 of 1958 on the Nationalization of the Netherlands Enterprises. This measure was taken to secure national economic survival in the battle against the Netherlands over West Irian.

The nationalization incident had created legal controversy amongst the enterprises and one case had been brought for adjudication to a German court.<sup>18</sup> It created strong controversial debate among international law scholars and most were of the view that this measure violated international law.<sup>19</sup> Even a prominent Indonesian scholar acknowledged that the measure as such *prima facie* violated international law, linking it to the protection of aliens and their property.<sup>20</sup>

Indonesia's approaches towards international law continued along the same lines when it encountered the potential endangering of its strategic interests caused by the prevailing international law of the sea amidst its war over West Irian. Indonesia's geographical landscape is consisted of thousands of islands scattered throughout the archipelago. Indonesia took issue with the three-mile limit of the territorial sea,

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<sup>18</sup> Decision of Landesgericht 1958 and Oberlandesgericht Bremen 1959, *De Verenigde Deli Maatschappijen vs Deutsch-Indonesischen Tabak Handels G.m.b.H.* Martin Domke, 'Indonesian Nationalization Measures before Foreign Courts', 54 *AJIL* (1960) 2, 205-323 and the reply by Hans W. Baade, 'Indonesian Nationalization Measures Before Foreign Courts - a Reply', 54 *AJIL* (1960), 801-835.

<sup>19</sup> Board of Editors, 'The Measure Taken by the Indonesian Government against the Netherlands Enterprises', 5 *NILR* (1958) 3, 227-247; Lord McNair, 'The Seizure of Property and Enterprises in Indonesia', 6 *NILR* (1959) 3, 218-256; Alfred Verdross, 'Die Nationalisierung niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts', 6 *NILR* (1959) 3, 278-290.

<sup>20</sup> Mochtar Kusumaatmadja, *Pengantar Hukum Internasional* (Introduction to International Law) (1976), 48-49.



which refers to the traditional and largely obsolete conception of the international law of the sea that defined the country's territorial waters for the purposes of trade regulation and exclusivity. This three-mile limit essentially limited national rights and jurisdiction over the sea surrounding and separating the islands that make up the Indonesian archipelago. Under this international law, the waters would cause the country to be, geographically, more divided than united at a time when Indonesia faced regional disintegration movements. The resulting vulnerability in terms of security posed a real threat to Indonesia's survival as a unified nation and the unfairness of this law was largely felt.<sup>21</sup>

In reaction to this perception of unfairness, Indonesia launched a unilateral legal action under which the waters were regarded as unifying rather than separating elements. In 1957 Indonesia unilaterally issued the so-called *Djuanda* Declaration by which Indonesia drew straight baselines connecting the outermost points on the low watermark of the outmost islands. Indonesia made a claim of 12-mile territorial sea limit, by which the breadth of its territorial sea was 12 miles measured from the baselines, instead of the three miles recognized by the prevailing law of the sea at the time. It further claimed that the waters within this limit, which previously had high seas status, became internal waters and subject to its exclusive sovereignty. The declaration appeared to constitute a blatant violation of the existing international law and invited strong protest from most Western states,<sup>22</sup> especially from the United States of America.<sup>23</sup> Albeit rejected later by the Geneva Conference of 1958, Indonesia insisted on applying this limit through the issuance of Law No. 4 of 1960 and maintained a 'persistent non-compliance to international law' until the special regime was completely accepted internationally as it was adopted in the UN Convention on the Law of the Sea of 1982.

Hostility towards international law gradually turned to apathy by the Western world when Indonesian political ideologies moved closer to align with the socialist bloc (Soviet Union and China). Moreover, presi-

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<sup>21</sup> Some writers like Sornarajah state that: 'once free, the new states began to construct a series of principles of international law that conserved their interests', see Sornarajah (note 15), 286.

<sup>22</sup> Daniel P. O'Connell, *The International Law of the Sea* (1982), 39.

<sup>23</sup> Arthur H. Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas', 54 *AJIL* (1960) 4, 753.



dent Soekarno in 1963 spearheaded the idea of forming a gathering of New Emerging Forces, or NEFOS, represented by nations within Asia, Latin America and socialist countries. The gathering was proposed to formally oppose the Old Emerging Forces, or OLDEFOS, represented by what he referred to as capitalistic nations.

Indonesia's views against international law reached its climax when Indonesia, through a letter to the United Nations dated 20 January 1965, withdrew<sup>24</sup> from the UN and its agencies by stating:

*"... that in the circumstances which have been created by colonial powers in the United Nations are so blatantly against our anti-colonial struggle and indeed against the lofty principles and purposes of the United Nations Charter, the Government felt that no alternative had been left for Indonesia but withdrawal from the United Nations."*

The withdrawal was only temporary as Soekarno was forced out of power in 1966. Indonesia's views on international law in this period were not without scholarly support. A number of prominent scholars backing this legal standing referred to arguments that were known to international law.

When dealing with the allegation of infringement of *pacta sunt servanda* with regard to the 1950 unilateral termination of the Round Table Agreements of 1949, Roeslan Abdulgani, a prominent scholar, argued that the legal measure taken by Indonesia could be justified by the principle of *rebus sic stantibus*.<sup>25</sup> In his remarks to the London Conference on the Suez Canal Crisis in 1956, Abdulgani clarified the position of Indonesia towards treaties by stating:

*"Mr. Chairman, I understand fully Sir Anthony Eden's remarks this morning about respect for the sanctity of international law. However Mr. Chairman, I should add one comment upon this, and that is that most interna-*

<sup>24</sup> The UN Charter makes no provision for withdrawal from membership so it is argued that the Indonesian action had no basis, see Egon Schwelb, 'Withdrawal from the United Nations: the Indonesian Intermezzo', 61 *AJIL* (1967), 661-672. In 1966 Indonesian participation was resumed and the Secretary General U Thant regarded the "withdrawal" as a suspension of Indonesian activities in the UN. Consequently, Indonesia remained bearing its annual contribution in the absence of its activities, see Kusumaatmajda (note 20), 89-99.

<sup>25</sup> Roesland Abdulgani, *Hukum dalam Revolusi dan Revolusi dalam Hukum* (Law in the Revolution and Revolution in the Law) (1965), 36.

*tional treaties which are a reflection of international law do not respect the sanctity of men as equal human beings, irrespective of their race, or their creed or locality. Most of the existing laws between Asian and African and the old-established western world are more or less outmoded and should be regarded as a burden of modern life. They should be revised and be made more adaptable to modern international relations and the emancipation of all parts of mankind.*"<sup>26</sup>

President Soekarno had subscribed to this legal position and expressed it in his various influential public speeches, which successfully induced negative sentiments in Indonesia towards international law, especially treaties. He condemned scholars who overemphasized the sanctity of treaties. He argued that treaties were always subject to revision if they were against the justice of mankind. He referred to treaties allowing colonialism, and pointed out that they should be immediately abolished.<sup>27</sup>

Another prominent legal scholar, Yamin, whose thoughts were influenced by the legal system of the Netherlands, also criticized international law as it stood until the 20<sup>th</sup> century, as law belonging to and made by the Christian-dominated Western Europe. Yamin pointed out that Eastern Europe and Asia did not participate in its making.<sup>28</sup> The idea became a public perception during the given period and, to some extent, discouraged the development of interest in international law in Indonesia.

## B. NO COLD SHOULDER DURING THE NEW ORDER (1966-1998)

President Soeharto ruled with an iron fist in a period of authoritarian ruling later to be referred to as the New Order, which began in 1966 and lasted for 32 years. The administration was heavily centralized, completely back by the Indonesian Armed Forces, which fell under the command of Soeharto, who steadfastly held power in all relevant sectors - political and public governance, economic and bureaucratic. In

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<sup>26</sup> Speech of the Indonesian Foreign Minister at the London Conference on Suez Canal, 16 August, 1956, in Abdulgani (note 25), 59.

<sup>27</sup> President Soekarno's Speech on 17 August, 1959, *Bahan-bahan Pokok Indoktrinasi* (Basic Materials on Indoctrination (1964), 33.

<sup>28</sup> Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* (Preparatory Documents to the Constitution of 1945), vol. III (1960), 48.

light of past political experiences, the New Order focused on political and economic stability, giving no room to constitutional changes that could trigger political instability for the regime.

Viewpoints can change. During Soeharto's New Order, Indonesia warmed up to international law as the country opened itself up and grew closer to the Western world. Indonesia chose to become more cooperative with respect to international law. This change in its stance toward international law was stressed as prominent scholar Professor Mochtar Kusumaatmadja sought a balance between the legal requirements of developing nations and the stability and relevance of international legal obligations. He pointed out that the existing international law might be outdated and may no longer adjust to the dynamism of the changing international world and its communities. Professor Kusumaatmadja said that Indonesia's rejection of unequal international legal obligations should not constitute a violation of international law. He further argued that Indonesia's attitude of not completely accepting existing international regulations was acceptable as long as Indonesia takes into account the legal interests of other states and was willing to contribute to the necessary changes.<sup>29</sup>

Inspired by the legal thought of Professor Kusumaatmadja, the persistent disobedience to the law of the sea transformed into a constructive engagement in which Indonesia, instead of merely ignoring the prevailing law, played an active role in negotiating with the international community on the maritime regime that it had unilaterally claimed at the Third UN Conference on the Law of the Sea since 1974. The negotiation led by Professor Kusumaatmadja achieved a compromise, through the adoption of the archipelagic state concept in the UN Convention on Law of the Sea in 1982.<sup>30</sup>

Indonesia's success in gaining international recognition for 'breaking international law' got many scholars to view differently of Indonesia's endeavour to seek the recognition of the archipelagic state con-

<sup>29</sup> Kusumaatmadja (note 20), 63.

<sup>30</sup> The archipelagic concept for which Indonesia sought international recognition had been submitted to the UN Conference by Mochtar Kusumaatmadja in a well-formulated descriptive international legal policy statement, see Kusumaatmadja, *Konsepsi Hukum Negara Nusantara pada Konferensi Hukum Laut ke III* (The Legal Concept of an Archipelagic State at the Conference on the Law of the Sea)(1977).

cept: Indonesia did not break international law but instead it had made it.<sup>31</sup> As Mochtar Kusumaatmadja<sup>32</sup> claimed, a unilateral act of a state driven by its basic need may constitute a newly emerging rule of international law by virtue of customary international law. He further argued that a unilateral act taken by a developing country, be it destructive or constructive to international law during the initial stages, should not necessarily be considered destructive in the end. This was successfully demonstrated by the Indonesian experience when it came to dealing with the international law of the sea.

As military power dominated the political scene during the New Order, international law was appreciated and took some effect on the basis of political rather than legal relevance: it was the will of the President that determined whether or not international law should bind or influence the state. It was political power that could push Indonesia to be receptive to international law. Hence, Indonesia accepted to take its dispute against Malaysia over the Ligitan and Sipadan Islands to the International Court of Justice in 1997 and was bound by its decision. It was the same political power that encouraged Indonesia to integrate East Timor in 1976 by means of a course of action that was claimed by the international community as incompatible with international law.<sup>33</sup> Consequently, international law did not find its legal basis or foundation in the national legal system because its effective application had not been enforced through law.

Issues on human rights were dealt with peculiarly under the New Order regime. On the pretext of non-interference and driven by anti-colonial sentiments, Indonesia saw its people living in a state of repression and were in a phase of denial towards human rights violations.<sup>34</sup>

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<sup>31</sup> Barbara Kwiatkowska, 'The Archipelagic Regime in the Philippines and Indonesia, Making or Breaking International Law', 6 *International Journal of Estuarine* (1991) 1, 13-30.

<sup>32</sup> Kusumaatmadja (note 20), 56-65.

<sup>33</sup> In 1975 Indonesia incorporated East Timor by invoking that self-determination had taken place as expressed by the representatives of the people through the *Balibo Declaration* of 1975. The UN had not recognized the Indonesian claim that the people had exercised the right of self-determination and kept the issue in the agenda until 1999. In that year, following the act of self-determination sponsored by the United Nations, East Timor became a new sovereign state.

<sup>34</sup> Anja Jetschke, 'Linking the Unlinkable? International Norms and Nationalism in

Indonesia was governed by a political force and, with national security and stability high on the political agenda, international human rights laws were considered incompatible with the interests of the Indonesian government. Resistance to international laws on human rights began in 1975 when Indonesia was dealing with the matter of the occupation of East Timor. Amidst international pressure, Indonesia showed resistance by associating itself with a group of states in favour of the concept of cultural relativism - versus Western universality of human rights,<sup>35</sup> and developing Asian values of human rights - which in academic discourse was considered an attempt to legitimize authoritarian rule.<sup>36</sup>

The human rights policy pursued by the regime was inspired by the idea of an integralist state. This idea had been proposed by Prof. Soepomo<sup>37</sup> during the preparatory stages of Indonesia's independence in 1945. Soepomo underlined that an integralist state saw the interests of the whole coming before the interests of individuals. This concept was effectively applied by the New Order regime, in which individualistic rights were considered secondary or even irrelevant to those of the state. It thus provided no space for the respect of human rights, as understood by Western values.

### C. THE REFORM ERA (1998 - TO PRESENT TIME)

Political reforms that took place in 1999 led to radical changes in the Indonesian legal infrastructure, including constitutional and institutional changes. International law however, even with constitutional changes, did not receive any particular attention and not one single con-

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Indonesia and the Philippines', in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (1999), 141.. It is held that the socialization of states to international human rights norms can be divided into a five-phase spiral model: 1. Repression; 2. Denial; 3. Tactical concessions; 4. Prescriptive status; 5. Rule-consistent behavior.

<sup>35</sup> R.J. Vincent, *Human Rights and International Relations* (2001), 39-48.

<sup>36</sup> Knut D. Asplund, 'Resistance to Human Rights in Indonesia', 10 *Asia-Pacific Journal on Human Rights and Law* (2009) 1, 27-47.

<sup>37</sup> Prof. Soepomo, a member of Investigating Committee for Independence, submitted before the Committee the idea of 'totalitarian state' similar to Germany under the Nazi regime or Japan before World War II to be adopted for independent Indonesia, see Supomo, 'Integralist State' in Herbert Feith and Lance Castles (eds.), *Indonesian Political Thinking 1945-1966* (1970), 188-192.

stitutional provision deals with its status. The absence of constitutional provisions making reference to international law might not be surprising. The Reform movement reflected domestic pressures that highlighted domestic problems. The emphasis was therefore on strengthening the constitutional framework, and international law was not a priority.

In this context, one may strongly argue that there is nothing wrong with the status of international law under the current legal system and therefore there is no urgent need to discuss it under the agenda of reform. The most determining factor underlying the 'ignorant attitude' towards international law is the notion that this branch of law, with regard to its status in Indonesia, is neither well-known nor of particular interest to the public. International law is until present times only of interest to a small group of scholars and government officials who directly need to deal with issues of international law and treaties. The law may generally be perceived as hardly present in the daily lives of the general public and if it is the otherwise, it is still understood in a very limited scope.

The academic community in Indonesia does however take interest in international law. Nevertheless, the teaching of international law in Indonesia is still basic and far from the levels attained in developed countries.<sup>38</sup> Therefore research work about the place of international law in the Indonesian context is rare.<sup>39</sup> Even as it is taught in many universities in Indonesia, international law is still conveyed as an isolated field of law with no link to national law.

A subchapter on the relationship between international law and domestic law has been taught in the universities without making any significant reference to Indonesian law and if any, such references suggest only indications.<sup>40</sup> Indonesian scholars have so far shown little common

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<sup>38</sup> Hikmahanto Juwana, 'Teaching International Law in Indonesia', 5 *Sing. J. Int'l & Comp. L.* (2001) 412, 412-415.

<sup>39</sup> Some scholars have dealt with the question of treaties from the perspective of Indonesian legal policy. They however mainly emphasized the conclusion instead of the status of treaties under Indonesian law, such as Harjono, *Politik Hukum Perjanjian Internasional* (Politics of Law of Treaties) (1999); Swan Sik Ko also briefly introduces the matter of Indonesian law dealing with treaties, see Swan Sik Ko, *The Indonesian Law and Treaties 1945-1990* (1994).

<sup>40</sup> Indonesian scholars in the 1950s such as Prof. Utrecht and Prof. Kusumaatmadja in the 1980s have indicated that Indonesia tends to pursue the monist approach, see E.

interest with regard to the status of international law under domestic law. Until recently, the issue of the relationship between international law and domestic law did not garner the required attention of scholars or lawmakers and did not constitute an academically controversial issue in Indonesia. There might be several reasons that could explain this phenomenon:

1. Experts in constitutional law in Indonesia and international law were busy in their own spheres of expertise and viewed treaties from their specific perspectives.<sup>41</sup> For constitutional law experts, treaties are merely theoretically a source of constitutional law. For internationalists, treaties are legal documents under international law. Internationalists have little interest to deal with their domestic status. Due to the rather executive-heavy political setting, practical questions on treaties never appeared in public debate and, if any, were settled through political solutions. Academic discourse was therefore not encouraged. The discussion, if any, lacks attention to international aspects of constitutional law and depicted a deficit on constitutional aspects of international law.
2. Following Indonesia's independence in 1945, Indonesian scholars were preoccupied with the nationalist sentiment and viewed international law as colonial law. Scholars turned to international law only when domestic laws and interests were at stake.<sup>42</sup>
3. As an archipelagic state, most parts of Indonesia are located in remote areas far from cross-border interactions. International relations were therefore mostly viewed as relations between and by governments instead of relations between and by individuals. This circumstance stimulated scholars to be more conservative in their way of thinking on international law. Treaties were viewed merely as inter-state documents belonging to the exclusive domain of the Foreign Ministry. The question of the domestic status of treaties did

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Utrecht and Moh. Saleh Djindang, *Pengantar dalam Hukum Indonesia* (Introduction to Indonesian Law) (1983), 120; Kusumaatmadja (note 20), 65-67.

<sup>41</sup> The situation is also attributed to the structure of Faculties of Law in Indonesia where constitutional and administrative law and international law are separate subjects that belong to separate departments.

<sup>42</sup> The law of the sea became a crucial subject between 1960 and 1982, when Indonesia submitted to the UN its national strategic interests in attaining acceptance of international archipelagic concepts.



not concern the public and therefore was of interest neither to constitutionalists nor for internationalists.

### **III. THE NEED FOR CLARITY ON INTERNATIONAL LAW IN A DEMOCRATIC INDONESIA**

#### **A. CONSEQUENCES OF A DEMOCRATIC LEGAL SYSTEM**

Indonesia is now in transition to becoming a fully-fledged democracy. Within such a system, the principle of rule of law (*Rechtsstaatlichkeit*), which encompasses legality, certainty and equality is an inherent part of any democratic society. All newly democratic states have experienced this call and subsequently they are required to deal with the status of treaties under domestic law. As treaties will affect the rights and obligations of individuals, their validity under domestic law must be constitutionally determined, instead of being determined by discretionary power. In other words, a system that governs the status of treaties and provides them with clarity under domestic law is *conditio sine qua non* for a democratic legal system.

Democratic transition in Indonesia has prompted the state to provide clarity on the status of international law under its domestic law. Before becoming democratic, most states in transition had neither a clear attitude nor constitutional and legislative provisions with respect to this matter. Before the transition, for example South Africa, as a former member of the Commonwealth, was supposed to follow the same general practice as other members but there was little judicial authority in support of that supposition.<sup>43</sup> With the inception of the new Constitution in 1994, South Africa created a clearer regime on the relationship between international law and South African law and on the status of international law in South Africa.<sup>44</sup> For the first time, its Constitution included provisions governing the status of international law under its domestic law. It is claimed that the relationship between international law and South African municipal law is now more clearly defined than

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<sup>43</sup> J.W. Bridge, 'The Relationship between International Law and the Law of South Africa', 20 *ICLQ* (1971), 746.

<sup>44</sup> Dermott Devine, 'The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1992', 44 *ICLQ* (1995), 1.

ever before.<sup>45</sup>

The new democratic countries in Eastern Europe and former Soviet Union countries face the same situation and were determined to adopt a clearer legal regime with regard to the legal status of treaties under their domestic law. Before democratization, the status of international law in their domestic law was not regulated either by a constitutional provision or by the lower legislation. Consequently, the legal system created a lack of consistency and clarity in both practice and academic discourse. Urged by scholars, the relationship between international law and domestic law, including the status of treaties, has been regulated by the constitution.<sup>46</sup> Although the kinds of relationships they establish differ, such general clauses are present in most of the new constitutions.<sup>47</sup>

Indonesia in turn is required to follow the democratic transition path. Following the collapse of the New Order in Indonesia, the country's political structure came under serious scrutiny and its foundations as a nation and a state were shaken.<sup>48</sup> A series of constitutional reforms thereupon took place from 1999 to 2002. These constitutional reforms resulted in a fundamental change in the state's structure and distribution of powers. Ideally, reforms which included decentralization of power would act as prerequisites to a well-functioning democratic order.

The original Constitution of 1945 (before the amendment) was criticized by many Indonesian constitutionalists for its many defects. Prominent constitutional law expert, Moh. Mahfud,<sup>49</sup> confirmed that before the amendment the Constitution provided a system that was executive-

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<sup>45</sup> Andre Stemmet, 'The Influence of Recent Constitutional Developments in South Africa on the Relationship between International Law and Municipal Law', 33 *Int'l L.* (1999) 1, 74.

<sup>46</sup> Eric Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions', 88 *AJIL* (1994) 3, 427-450.

<sup>47</sup> Vladlen S. Vereshchetin, 'New Constitution and the Old Problem of the Relationship between International Law and National Law', 7 *EJIL* (1996), 34.

<sup>48</sup> I Ketut Putra Erawan, 'Political Reform and Regional Politics in Indonesia', 39 *Asian Survey* (1999) 4, 588.

<sup>49</sup> Moh. Mahfud, *Amandemen Konstitusi Menuju Reformasi Tata Negara* (Amending the Constitution for Constitutional Reform) (1999), 52; Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer dalam Sistem Presidensial Indonesia* (A Shift in Legislative Functions: Enhanced Parliamentary System of Legislation in the Indonesian Presidential System) (2010), 1-10.

heavy, lacked in checks and balances, delegated too many constitutional functions to the statute level, contained ambiguous articles and depended too strongly on the political goodwill and integrity of politicians. The question on the legal status of treaties under domestic law was therefore dealt by the discretionary power of the executive (government) without any checks and balances from the legislative branch. The amendment of the Constitution created a system that could in theory, remove those defects by granting more power to the House of Representatives, providing a clearer checks and balances system, elaborate on constitutional provisions and prescribe to the rule of law. The system could sustain the political stability of domestic implementation of treaties but at the same time it failed to explain their legal status under domestic law.

The present Constitution (amended) is characterized by the following transformation, i.e. from:

- (a) authoritarian into a democratic government;
- (b) executive-heavy to equal checks and balances;
- (c) military power to supremacy of law and justice;
- (d) ignoring rights issues, to respecting human rights issues;
- (e) centralization into regional and local autonomy.

The current constitutional and state structure undoubtedly necessitates a clear legal system, including the governing of the relationship between international law and national law. Under the present Constitution, distribution of powers between executive, legislative and judicial powers is now established and clearly set. The executive organ has been endowed with powers that are restrictive, including its treaty-making powers and the implementation of treaties. The legislative organ (House of Representatives) plays a dominant role in drafting out and passing legislation and is therefore instrumental in shaping up the status of international norms in the domestic sphere. Judicial power is now independent from executive influences in interpreting and determining the effect of treaties concluded by Indonesia. To some extent, the question of judicial review of treaties has been raised. Through a checks and balances system, the constitutional organ shall ensure that treaties are observed on the basis of the domestic legal system.

The question of the relationship between international law, espe-

cially treaties and domestic law, is now on the political agenda. Critical and legal questions about the status of treaties under domestic law have been increasingly raised, not only in the conduct of state in international relations but also among lawmakers, practitioners and legal enforcers. Treaties concluded by Indonesia are increasingly on the rise not only in quantity but also quality. The recent tendency of treaties to govern the rights of individuals, such as human rights, environment and trade treaties created debate in a domestic level and prompted a search for criteria and a mechanism for their domestic application.<sup>50</sup>

Under such circumstances, the absence of a clear legal regime on the status of treaties under domestic law will create uncertainty and unpredictability concerning the rights and obligations arising from such treaties. From the outside it seems obvious that Indonesia is required to observe its treaty obligations in line with the international legal order. It is commonly said that states that have not equipped their legal systems to cope with international law would face the risks of breaching international obligations and affecting the domestic balance of powers.<sup>51</sup>

Legal uncertainty in the absence of a clear legal regime on treaties is worsened through the effects of globalization, which has presented with many types of treaties that are intrusive in nature and touches upon the typical domain of domestic law, i.e. treaties on environment, human rights and trade.<sup>52</sup> Indonesian law can no longer stand on its own, and, as experienced by all states, will face constant pressure to synchronize

<sup>50</sup> The contentious debate is revealed in a series of focus group discussions on the Status of Treaties under the Indonesian Legal System convened by the Indonesian Ministry of Foreign Affairs and attended by law scholars from various universities since 2006. The proceedings can be read in *Perjanjian Internasional dalam Teori dan Praktik Indonesia, Kompilasi Permasalahan* (International Treaty in Theory and Practice in Indonesia, Compilation of Issues), Ministry of Foreign Affairs of the Republic of Indonesia (2008); *Status Perjanjian Internasional dalam Tata Perundang-undangan Nasional* (Treaties under National Laws), Ministry of Foreign Affairs of the Republic of Indonesia (2009).

<sup>51</sup> Giuliana Ziccardi Capaldo, 'Treaty and National Law in a Globalizing System', in *The Global Community, 1 Yearbook of International Law and Jurisprudence* (2003), 140.

<sup>52</sup> It is commonly argued that globalization [international law] has penetrated the once exclusive zone of domestic affairs to regulate relationships between governments and their own citizens, see Anne Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', 47 *Harv. Int'l L. J.* (2006) 2, 327.

with international standards. It has been argued that whereas in the past the municipal sphere was beyond the reach of the international community, it appears that there are minimum requirements on the international level concerning the internal order of states imposed by treaties.<sup>53</sup>

As a democratic state that has been predominantly inspired by the Western model, Indonesia is now applying legal standards commonly featured in democratic modern states. Rule of law, parliamentary participation, separation of powers and legal certainty are amongst the principles that should underlie the legal regime that is to be created. As a consequence, Indonesia needs to address this question in order to establish a regime that could provide legal certainty (precision) and predictability concerning the status of treaty *vis-à-vis* domestic law. The question of the relationship between treaties and domestic law also involves the hierarchical status of treaties within the domestic legal system.

From its inception, Indonesia has consistently developed its national laws by subscribing strictly to Hans Kelsen's *Grundnorm* and *Stufenbau* theory. Indonesian legal architecture recognizes the hierarchy of legal norms and starts from the fundamental norm (ideology of *Pancasila*) and the Constitution from which flows other legal norms in a hierarchical manner.<sup>54</sup> The Law No. 12 of 2011 prescribes that types and hierarchies of laws and regulations are:

- a. Constitution 1945;
- b. Decisions of the People's Consultative Assembly;
- c. Law/Government Regulations Replacing the Law;
- d. Government Regulations;
- e. Presidential Regulations;
- f. Provincial Regulations;
- g. Local and City Regulations.

The hierarchical construction would inevitably give rise to the question of where international law, especially treaties, is placed in domestic law.<sup>55</sup>

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<sup>53</sup> Stefan Kadelbach, 'The Transformation of Treaties into Domestic Law', 42 *GYIL* (1999), 67.

<sup>54</sup> Since 1966, inspired by Hans Kelsen with his *Grundnorm and Stufenbau des Rechts/Stufenbau der Rechtsordnung* theory and Hans Nawiasky with his *Staatsfundamental Norm* theory, Indonesia has constructed a hierarchical system of norms. The Law of the Republic of Indonesia No. 12 of 2011 governs the current system.

<sup>55</sup> The rank of treaties has commonly been acknowledged as a critical subject of the

## B. COMPLIANCE WITH INTERNATIONAL LAW

Indonesia is undergoing profound developments, arising from internal and external influences. Internally, as a new democratic state, its legal system has been called upon to meet international standards through the passing of domestic law that can put treaty obligations into domestic effect. Externally, Indonesia is witnessing profound changes of the international legal system - globalization - which imposes so-called international minimum requirements concerning the internal legal order of states.<sup>56</sup>

Since its inception as a sovereign state, Indonesia has concluded many treaties. Concluding treaties has in fact become a daily activity for Indonesia, as the government has been actively engaged in the treaty-making process in many fora, including those involving the UN frameworks, regional and bilateral context. To date, Indonesia has been a party to almost 4,000 treaties, and they cover wide-ranging issues.

Those concluded by Indonesia that are intended to produce domestic effects are on the rise, particularly in the field of economic relations such as free trade, investment guarantees, double tax avoidance treaties; and legal cooperation such as extradition, mutual legal assistance, combatting transnational organized crime, anti-corruption and counter-terrorism.

Following the multidimensional crisis of 1998, all Presidents that have taken office ever since have consistently set the same targets in regard to foreign policy. The targets are a greater role for Indonesia in terms of international relations and in creating world peace; a restored image of Indonesia; boosting confidence in the international community; encouraging the creation of a better regional and international economic order as well as cooperation in supporting national development.<sup>57</sup>

It is argued that Indonesia can only attain its desired reputation and

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status of treaties under domestic law, see Francis G. Jacobs, 'Introduction', in G. Jacobs and Roberts (note 3), xxiv.

<sup>56</sup> Kadelbach (note 53), 67-68.

<sup>57</sup> Kementerian Negara Perencanaan dan Pembangunan Nasional, *Rencana Pembangunan Jangka Menengah 2004 – 2009, Bab 8* (The Ministry of National Development Planning, the National Medium-Term Development Plan 2004 – 2009 of Indonesia, Chapter 8).

credibility at the international level if it demonstrates its compliance to international law.<sup>58</sup> Compliance with regard to treaties would be the most important parameter. As a party to treaties, Indonesia is bound by the principle of *pacta sunt servanda* - a fundamental principle of international law - which prescribes that treaties and other agreements are binding on the parties and must be performed in good faith.<sup>59</sup> Failure to do so by any state would not only constitute a breach of international law but also bring about a non-compliant status, which could adversely affect a state's international reputation and credibility as a member of the international community.

It has been noted that failure to observe treaty norms in the domestic sphere shall involve the responsibility of that state, which cannot rely on its domestic law. A state is under obligation to ensure that the treaties are applicable under its domestic law. How treaties are transformed or adopted and ranked within the respective internal legal order is a matter of domestic law.<sup>60</sup> These traditional premises remain in place insofar as a so-called Westphalian model of sovereignty characterizes international law.<sup>61</sup>

Globalization requires greater observation and adherence to treaties by domestic law and for that purpose a strong mechanism for compliance with treaties has been developed under international law. It is interesting to note that many multilateral treaties nowadays, to which Indonesia is a party, include mechanisms to ensure the compliance of the parties with obligations arising from the treaties. Within the framework of the United Nations human rights treaties, the treaty monitoring sys-

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<sup>58</sup> From empirical implications of pre-commitment and diffusion theories, Ginsburg found that adopting international law is a useful strategy for democracies to lock in particular policies, encouraging trust in governments and state regimes, and bolstering global reputations, see Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law', *University of Illinois Law Review* (2008), [http://works.bepress.com/tom\\_ginsburg/18](http://works.bepress.com/tom_ginsburg/18), 201 (last visited on 9 April 2013).

<sup>59</sup> Article 26 VCLT of 1969.

<sup>60</sup> Kadelbach (note 53), 66.

<sup>61</sup> Stephane Beaulac, 'Westphalia, Dualism and Contextual Interpretation', EUI Working Papers, European University Institute (2007), 5-6; Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2006), 258.



tem has been developed and treaty bodies have been established with a view of promoting states parties' compliance with treaty obligations.<sup>62</sup> Indonesia is also scrutinized by this mechanism, and from its foreign policy perspective,<sup>63</sup> it is committed to comply with obligations under the treaties. As human rights treaties are concerned with the rights of individuals that are subjects of domestic law, their implementation in the domestic sphere is absolutely necessary. In doing so, Indonesia continues to face questions on how such treaties are enforced at the domestic level, a matter of which can only be effectively addressed when a clearer domestic status is provided for treaties.<sup>64</sup>

### C. DECENTRALIZATION

One of the main agendas for political reform in 1999 was the reform of the political system against absolute centralized power. Under the previous system, the central government had played a key and decisive role by which local governments were fully under its control. The powers of local governments were derived from the central government. Thus, in carrying out their governmental activities in the given regions, provincial administrations simply acted on behalf of the central government.

The reformed Constitution paved the way to greater autonomy by reforming the central and local government into a three-tier system: the central government, provincial governments and regental governments (*kabupaten*) or cities. A fast and wide-ranging process of decentralization and devolution of powers was granted to all levels of authorities by

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<sup>62</sup> Michael O'Flaherty and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body', 7 *Human Rights Law Review* (2007) 1, 141-172.

<sup>63</sup> Since its inception as a democratic state in 1998, Indonesia has launched a series of plans of action on human rights aimed at, *inter alia*, implementation of the norms and standards of human rights. The current plan of action (2011-2014) is stipulated in the Indonesian Presidential Regulation No. 23 of 2011.

<sup>64</sup> The UN Human Rights Bodies such as Committee on the Elimination of Racial Discrimination posed a question to Indonesia on the status of the Convention in domestic law and to what extent domestic courts may directly implement its provisions, UN Doc. CERD/C/IDN/3, Seventy-first session, Geneva, 30 July-18 August 2007, question no. 3.

which they are entitled to exercise autonomous powers in all matters - except on matters concerning foreign policy, defence, security, financial and fiscal, judicial and religious affairs.

In addition to this decentralization of power, a special autonomous status was granted to certain provincial administrations i.e. Aceh and Papua. Both provinces argued that their special characteristics, historical and political backgrounds were distinct when compared to other local administrations. The call for granting special autonomy status for the two provinces were made long before reform took place because of some tensions between the central government and the said provinces. The tension also manifested in separatist movements involving foreign influences, a matter which invited international attention. A special autonomy status was thus granted to the two provinces. The powers they have acquired are broader than those enjoyed by the remainder of Indonesian provinces and municipalities.

Scholars generally underline the decisive role of the constitution in determining the treaty-making power of entities at a sub-state or a sub-governmental level. Subdivisions of a state may possess the capacity to conclude treaties, if such a capacity is admitted by the constitutional law of the state.<sup>65</sup> A provision in the final draft of the International Law Commission on the Law of Treaties,<sup>66</sup> which was removed during the diplomatic conference on the Law of Treaties in 1969, deferred to the constitution for such powers. The draft provided that: "State members of a federal union may possess the capacity to conclude treaties if such a capacity is admitted by the federal constitution and is within the limits laid down." The scrapping of the proposed provision was not in any way linked to a denial of the treaty-making capacity of such a federal union.<sup>67</sup>

<sup>65</sup> Helmut Steinberger, 'Constitutional Subdivisions of States or Unions and their capacity to conclude Treaties', 27 *ZaöRV* (1967), 428; Thomas A. Levy, 'Provincial International Status Revisited', 3 *Dalhousie L.J.* (1976-1977), 75.

<sup>66</sup> ILC Official Records: 21<sup>st</sup> session, Supplement No. 9 (A/6309/Rev.1), UN (1966), 10.

<sup>67</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 127-128; The principle reason for deletion was that by making capacity dependent solely upon the provisions of the federal constitution, the paragraph would in practice amount to an invitation to other states to interpret the constitution themselves, see J.S. Stanford, 'United Nations Law of Treaties Conference: First Session', 19 *U. Toronto L.J.* (1969), 60-61.

Going by the traditional view, the power to conclude an entire treaty from conclusion to performance of treaties was entrusted to the monarch as an exercise of his sovereignty. The wave of constitutionalism and the separation of powers have generated constitutional provisions which distinguish those related to the 'making', from those related to the 'performance' of treaties.<sup>68</sup> As a consequence, the treaty-making power has been allocated to various state organs, in either a horizontal or a vertical manner. Horizontally, state practices have witnessed the increasing participation of parliament, as it is the parliament, which is mainly entrusted with the domestic enforcement of treaties. Going vertically, as sub-states have exclusive competence to regulate certain matters, the performance of treaties on those matters inevitably involves their participation.

A number of articles however explain the treaty-making power of sub-states by making references mainly to federalism, under which the sub-states are entrusted with exclusive competence on certain matters. This question is significant under federalism: where government powers are distributed between a central authority and regional authorities. Under these two, every individual is subject to two law-making authorities. The central and regional authorities are coordinated - neither one is subordinate to the other.<sup>69</sup> State practices demonstrate that the issue is not merely linked to federalism but also relates to the colonial context, overseas territories and other dependent territories of existing states. It therefore demonstrates that the treaty-making power of entities other than those of states was not unknown. Further, pending the completion of decolonization, a number of self-governing associated states administered by the United Nations and territories enjoyed full internal self-government - recognized as such by the United Nations - before attaining full independence.

Even though it is suggested that the treaty-making power of sub-states is declining and the trend is waning,<sup>70</sup> the basic premises under-

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<sup>68</sup> Luzius Wildhaber, 'Provisions of Internal Law Regarding Competence to Conclude a Treaty', 8 *Va. J. Int'l L.* (1967-1968), 94.

<sup>69</sup> A. Kim Campbell, 'Federalism and International Relations: The Canadian Experience', 85 *ASIL. Proc.* (1991), 125.

<sup>70</sup> Oliver J. Lissitzyn, 'Territorial Entities other than Independent States in the Law of Treaties', *RdC* (1968-III), 87.

lying the question remain. It now relates to managing conflicts of authority - between the central and its sub-national governments - under constitutional arrangements which will characterize the scope of the latter's power with regard to treaties. Reasons that justify the powers to conclude treaties have also proliferated from merely defending and promoting their interests, values and identities, to circumstances such as decentralization and globalization. Under globalization, it has been pointed out that the necessity for broader foreign policy of sub-states is driven by the degree of democratization and federalization, the degree of socio-economic development, and the increasing internationalization of markets.<sup>71</sup>

Irrespective of the structure of the state - be it federalist or unitary - the question remains relevant to both situations: how to deal with the exclusive competence of sub-states on certain matters. They will similarly encounter the question of treaty-making powers under constitutional arrangements if such matters are subject to becoming regulated through treaties. A number of treaties have even provided clauses stating that the treaties are open for the direct participation of sub-states on matters in which they have exclusive competence beyond federalist situations.<sup>72</sup> Decentralization, where broader and even exclusive power is increasingly conferred to the sub-states, is not entirely free from this controversy.

It is relevant therefore to deeply explore how Indonesian constitutional arrangements address this issue. As a point of departure, there should be clarity being given on the status of international law under the Indonesian law.

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<sup>71</sup> Ferran Requejo, 'Foreign Policy of Constituents Units in a Globalised World', in Ferran Requejo (ed.), *Foreign Policy of Constituents Units at the Beginning of 21st Century* (2010), 11.

<sup>72</sup> The Agreement Establishing the World Trade Organization provides in Article XII that: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto."

#### **IV. CONCLUSION**

The attitude of Indonesia toward international law since its independence as a sovereign state has been changing progressively, from hostility to friendly. In the initial period, its creation as a state had been regarded as “violation of the prevailing international law” on colonialization but in the same time it developed a new emerging international norm of self determination. In this regard, Indonesia’s struggle for independence has constituted “a fight” against international law. This explains why Indonesia was so hostile with international law in this period.

In the “New Order” period, Indonesia did not deny international law as such. The receptive attitude with selective approach was characterised by the foreign policy. Indonesia turned to international law only insofar as it concerned with its strategic interest and survival. Indonesia therefore regarded the making of the law of the sea as a matter of paramount importance. On the other hand, Indonesia would resist international law if it affected its political survival and stability. Indonesia was therefore not in favour of the progressive development of the international human rights law. The receptive and selective policy was not deeply rooted in its legal system but it was successfully be sustained by the new order’s regime political stronghold.

Democratic transformation has made a strong call for further change of Indonesia’s attitude. As required by any democratic legal system, Indonesia must go more than just being amicable to international law. Indonesia should shape its domestic legal system in such manner where international law acquires a proper legal status under it. This is intended so that international law is not merely binding Indonesia at international level but it should also have proper legal effects under the domestic law. It appears that the Indonesian legal system is not yet being developed into such direction.

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